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No. 82-687

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ARTHUR YOUNG & COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether tax accrual workpapers, prepared by a corporation's independent certified public accountant in the course of regular financial audits, are privileged from disclosure in response to an internal revenue summons issued under 26 U.S.C. 7602.

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OPINIONS BELOW

The order of the district court (Pet. App. 1a-15a) is reported at 496 F.Supp. 1152.[1] The opinion of the court of appeals (Pet. App. 16a-39a) is reported at 677 F.2d 211.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1982 (Pet. App. 40a). The order denying the government's petition for rehearing, with suggestion for rehearing en banc, was entered on June 22, 1982 (Pet.

[1] The district court issued a modified order on February 23, 1981, which was not reported and which is reproduced at J.A. 106-107.

App. 41a). By order dated September 13, 1982, Justice Marshall extended the time within which the United States might file a petition for a writ of certiorari to and including October 20, 1982, and the petition was filed on that date. The petition was granted on February 22, 1983 (J.A. 108). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) are as follows:

> Sec. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.
>
> (a) *General Rule.*—The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.
>
> Sec. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or

employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Sec. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.* If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

STATEMENT

1. Respondent Arthur Young & Company, a firm of certified public accountants, has served as Amerada Hess Corporation's independent auditor since November 1971. In that capacity, respondent conducted financial audits of, and certified, Amerada's financial statements for 1972 through 1974 (Pet. App. 19a). Federal securities laws require publicly-owned companies such as Amerada to file certified financial statements annually. See 15 U.S.C. 78*l* and m and 17 C.F.R. Part 210, 210.1-01, 210.1-02(a), (d) and (f), and 210.2-01 *et seq.* The certification process requires the independent auditor to evaluate the reasonableness and adequacy of the corporation's reserve for potential tax liabilities.

As part of its certification of Amerada's financial statements, respondent prepared tax accrual workpapers,

which are documents and memoranda relating to respondent's evaluation of Amerada's tax liability reserves as they appeared in its financial statements. The tax accrual workpapers include facts pertaining to Amerada's financial transactions based upon company records and respondent's interviews with company personnel and with third parties, and may identify specific items whose treatment on Amerada's tax return for the year was questionable. If the auditor determines that these items could reasonably lead to additional tax liability upon examination by the Internal Revenue Service, it will recommend the establishment of additional contingency reserves (Pet. App. 24a-25a).

In May 1975, the Internal Revenue Service began an audit to determine Amerada's corporate income tax liability for 1972 through 1974. Amerada is an integrated oil company incorporated in Delaware, and it reported gross revenues for the years under audit exceeded seven billion dollars. During the course of the audit, Amerada disclosed to the revenue agents that it had maintained a "special disbursement account," a fund from which political contributions, gifts to foreign government officials, and other illegal or questionable payments were made, and that it had convened a special committee to investigate the company's practices with respect to such payments. Amerada turned over the final report of its special committee to the Internal Revenue Service. The report disclosed the deduction of some $7,830 in questionable payments during the years in question (Pet. App. 2a-3a; *id.* at 19a).

Upon receipt of the report disclosing the deduction of questionable payments by Amerada, the Internal Revenue Service assigned Special Agent Kalemba of the Criminal Investigations Division to join the investigation. In furtherance of the joint investigation, the Special Agent issued an administrative summons to respondent pursuant to 26 U.S.C. 7602, seeking, *inter alia*, the tax accrual workpapers prepared by respondent. Pursuant to 26

U.S.C. 7609, notice of the summons was sent to Amerada, which thereupon instructed respondent not to produce any of the documents called for by the summons (Pet. App. 2a-3a; *id.* at 19a-20a).

On October 9, 1979, the government commenced this proceeding to enforce the summons in the United States District Court for the Southern District of New York.[2] Pursuant to 26 U.S.C. 7609, Amerada intervened in the proceeding. Both Amerada and respondent filed answers to the petition opposing enforcement of the summons, objecting, *inter alia*, to the production of the tax accrual workpapers (Pet. App. 3a; *id.* at 18a).

The district court ordered production of the tax accrual workpapers. It found that the documents were relevant to the Internal Revenue Service's tax investigation of Amerada and rejected respondent's claim of an accountant-client privilege. The district court noted that this Court had refused to recognize such a privilege in *Couch* v. *United States*, 409 U.S. 322, 335-336 (1973), and that the First Circuit adhered to that view, even where the client claimed that it gave the information to the auditor under an expectation of privacy. See *United States* v. *Arthur Andersen & Co.*, 623 F.2d 725, 728

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[2] In support of its petition for enforcement of the summons, the government submitted an affidavit by Special Agent Armstrong, who had succeeded Special Agent Kalemba. In his affidavit, the agent stated, *inter alia*, that the summons had been issued in the course of a joint investigation by the Examination and Criminal Investigation Divisions of the Internal Revenue Service to ascertain the correctness of Amerada's tax returns for the years 1972, 1973 and 1974; that no decision or recommendation had been made regarding criminal prosecution of Amerada; and that the material sought was relevant to the purpose of the examination and was not in the government's possession (J.A. 11-14). Subsequently, there were repeated exchanges of affidavits between IRS officials, on the one hand, and Arthur Young and Amerada, on the other, in which Arthur Young and Amerada disputed the accuracy of the IRS agent's affidavit (J.A. 22-79). This factual dispute led to a hearing before the district court on January 3, 1980 (J.A. 80-88). After considering the conflicting affidavits, the district court enforced the summons with respect to the tax accrual workpapers.

(1980). As the district court concluded, "While there may be an expectation of privacy insofar as the world at large is concerned, Amerada cannot reasonably have such an expectation [of privacy] with regard to the IRS which, the taxpayer knew, could call for all materials underlying the tax returns and payments" (Pet. App. 9a).

2. A divided panel of the court of appeals reversed the district court's order with respect to the tax accrual workpapers (Pet. App. 28a-32a).[3] The court agreed with the district court's finding that tax accrual workpapers were relevant to the Internal Revenue Service's audit of Amerada's tax liability (*id.* at 24a-27a). The court nevertheless refused to enforce the summons because of its belief that "these documents should remain confidential in order to protect the reliability of the independent audit process" (*id.* at 19a).

In support of its decision, the court of appeals expressed the view that the policies behind the disclosure requirements of the federal securities laws outweigh the policies

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[3] The Internal Revenue Service's summons directed respondent to produce all files related to its client, Amerada Hess Corporation, for which respondent served as independent auditor (Pet. App. 17a-18a, 20a n.4). The district court ordered the production of all items sought by the summons except respondent's audit program and the documents prepared by the special committee that investigated Amerada's questionable payments. The government did not appeal the district court's refusal to enforce the summons with respect to the audit program and the special committee documents.

Accordingly, the only issues considered by the court of appeals were the production of audit workpapers and tax accrual workpapers (Pet. App. 20a-21a). Since the court of appeals affirmed the district court's order with respect to the audit workpapers (*id.* at 21a-24a), the government's petition to this Court was limited to the tax accrual workpapers. Although Arthur Young has sought to raise the question of the production of the audit workpapers in its cross-petition (No. 82-837), the Court has not granted that cross-petition, which remains pending. Hence, the only question before this Court is that presented by the government's petition, *i.e.*, the production of the tax accrual workpapers.

in support of the Internal Revenue Service's summons authority. As the court reasoned, these "countervailing policies" "require[d] * * * [it] to fashion protection for the work that independent auditors, retained by publicly-owned companies to comply with the federal securities laws, put into preparation of tax accrual workpapers" (Pet. App. 28a). The court apparently assumed that the tax accrual workpapers contain material with respect to the "thoughts and theories" (*id.* at 31a) of the taxpayer and its auditor concerning potential tax liabilities, and their strategies and plans for negotiations about these liabilities. It stated that "the Service does not need to know the taxpayer's thoughts," and that the IRS can obtain "all the raw data" needed to calculate the taxpayer's tax from other sources (*ibid.*). The court feared that if the summons were enforceable, corporate management "might not be perfectly candid with independent auditors" once it knew that such information would be reachable under § 7602 (*id.* at 30a). The court concluded that enforcement would therefore handicap investors, who must rely on independent auditors for financial information regarding publicly-traded securities (Pet. App. 31a).

In reaching its decision, the court relied on the attorney's work-product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947). Its reasoning, however, was based primarily on an asserted need to encourage confidential client-accountant communications—that is, on the need to create an accountant's communications privilege. The court concluded that the IRS may not obtain tax accrual workpapers except in the "rare situation * * * where it [the IRS] can make a sufficient showing of need to adequately justify invading the integrity of the auditing process" (Pet. App. 31a). No such showing, according to the court, had been made here, since all the relevant data were available to the IRS outside the tax accrual workpapers (*id.* at 32a).

The dissenting judge would have enforced the summons (Pet. App. 33a-39a). He believed that Congress had leg-

islated in favor of disclosure of all relevant documents not subject to traditional common law privileges, which do not include a privilege for either client communications to an accountant or an accountant's work-product. The dissent observed that "[i]f there is to be recognition of new privileges, we should leave that task to Congress" (*id.* at 35a). The dissent found nothing in the language or the legislative history of Section 7602 to indicate that Congress intended to exempt an accountant's work-product from Internal Revenue Service examination. Nor could he find anything in *Hickman* v. *Taylor*, or the Federal Rules of Civil Procedure, that would permit a court to depart from the broad command of Section 7602 (Pet. App. 36a-37a). As the dissent pointed out, there is no proper analogy between the attorney-client relationship and the relationship between a public corporation and its independent public accountant. The attorney-client relationship is completely private and cloaked in confidence. On the other hand, an independent public accounting firm has public obligations to assure itself that contingent tax liabilities have been accurately reflected, and must decline to certify a statement if it is not satisfied that it is accurate (*id.* at 37a-38a).

The dissenting judge also rejected the majority's premise that corporations would be so anxious to minimize their tax payments that they would be willing to deceive their own accountants about debatable tax items and thereby violate their obligations under the securities law. He doubted "that many corporations will be so anxious to avoid that result [paying what the tax laws require] that they will conceal these debatable items from their accountants in violation of the securities laws" (Pet. App. 36a). But even on the assumption that the majority's speculation was accurate, the dissent concluded that the courts should not afford publicly-held corporations "any shield behind which they can increase their

chances of avoiding detection that they have not paid either the amount of taxes a court might rule was lawfully required or whatever adjustment might result from a post-audit settlement" (*ibid.*).

SUMMARY OF ARGUMENT

1. In refusing to enforce an Internal Revenue Service summons directing a certified public accountant to produce tax accrual workpapers prepared in connection with its regular financial audits of a publicly held corporation and its certification of the corporation's financial statements, the decision below has created an accountant work-product privilege, under the rationale of an accountant-client privilege, that threatens to impede the Internal Revenue Service's tax investigations of public corporations. The case therefore stands in derogation of this Court's ruling in *Couch* v. *United States*, 409 U.S. 322, 335 (1973), that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases * * *."

As the Court most recently reaffirmed in *Trammel* v. *United States*, 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), any claim of privilege must overcome the settled principle that " 'the public * * * has a right to every man's evidence.' " Because testimonial privileges preclude the use of highly relevant evidence and therefore tend to be "an obstacle to the administration of justice" (8 J. Wigmore, *Wigmore on Evidence* § 2192, at 73 (McNaughton rev. ed. 1961); see *United States* v. *Nixon*, 418 U.S. 683, 711-713 (1974)), such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests" (*id.* at 709).

These considerations are fully applicable to the summons authority of the Internal Revenue Service. Section 7602 of the 1954 Code, authorizes the Secretary "[t]o summon * * * any * * * person * * * to appear * * * and to produce such books, papers, records, or other data * * * as may be relevant or material" to ascertaining the

correctness of any return. This Court has consistently construed this authority to embrace all appropriate measures for enforcement. See, *e.g.*, *United States* v. *Powell*, 379 U.S. 48 (1964); *Donaldson* v. *United States*, 400 U.S. 517 (1971); *United States* v. *Bisceglia*, 420 U.S. 141 (1975); *United States* v. *Euge*, 444 U.S. 707 (1980).

2. Both courts below found that the tax accrual workpapers sought from respondent were relevant to the Internal Revenue Service's investigation of Amerada (Pet. App. 8a; Pet. App. 26a-27a). These papers consist of an amalgam of materials bearing on the adequacy and reasonableness of the contingency reserves established by a corporation with respect to its tax liabilities. The papers contain facts that may not appear on the corporation's books of account. They may also shed important light on the taxpayer's state of mind regarding the treatment it ultimately presents on its tax returns; this evidence may bear on liability for fraud and other penalties. Finally, the papers may also contain the accountant's judgments regarding the corporation's reporting positions.

The purpose of obtaining tax accrual workpapers is not primarily to allow the Service access to the accountant's "opinions" and "theories". Rather, the Service's chief interest is to discover the relevant facts to enable it to make its own appraisal. Although production of these papers may help the investigating agent by highlighting certain issues, there is no basis for cloaking them in secrecy in the absence of an evidentiary privilege barring their production.

3. The court erred in barring production of the tax accrual workpapers on the authority of the attorney work-product doctrine established by this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In *Hickman*, the Court recognized a qualified privilege against pretrial discovery for certain materials prepared by an attorney "acting for his client in anticipation of litigation" (329 U.S. at 508). See *United States* v. *Nobles*, 422 U.S. 225, 236-240 (1975); *Upjohn Co.* v. *United*

States, 449 U.S. 383, 397-399 (1981). Here the papers were prepared by accountants—not by attorneys—in the course of a regular audit of financial statements—and not in anticipation of litigation. Apart from the decision below, we are aware of no case that extends the attorney work-product rationale to accountants' work-papers.

The law recognizes an attorney work-product privilege and not an accountant work-product privilege because of important practical differences between the function of an accountant and that of an attorney. The attorney is the client's confidential advisor who has an obligation of undivided loyalty to the client. An independent certified public accountant, as the title states, is supposed to be independent: its loyalty is not only to the client whose books it is auditing but also to various governmental agencies regulating its client's industry, to his client's creditors and to investors in its client's securities. Further, the accountant's role is not to give confidential advice but to give *public* reports on the adequacy of the client's financial statements. It was precisely these differences between accountants and attorneys that this Court recognized in *Couch* in rejecting the claim of an accountant-client privilege as to a taxpayer's records turned over to an accountant. See 409 U.S. at 335-336.

4. Although the decision below is couched in terms of the work-product privilege, it is plain that the court believed it was fostering candid communications between client and accountant for the benefit of the investing public and the enforcement of the securities laws. Such a rationale is the essence of a communications privilege.

The fundamental distinctions between attorneys and accountants, to which we have referred, have led this Court, and every court that has considered the issue, to reject the creation of an accountant-client privilege. *Couch* v. *United States*, *supra*, 409 U.S. at 335-336, and cases cited therein. An accountant's client has no justified expectation of confidentiality with respect to communica-

tions with an accountant, and there is therefore no justification for the creation of an accountant-client privilege.

Moreover, the rationale for such a privilege does not exist in this case. The principal contemporary justification for the attorney-client privilege is its presumed value in encouraging clients to make full disclosure to their attorneys. *Upjohn Co.* v. *United States*, *supra*, 449 U.S. at 389; 8 J. Wigmore, *supra*, §§ 2291 and 2306, at 590. Accordingly, it protects only those disclosures—necessary to obtain legal advice—which might not have been made absent the privilege. *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). But the communications from Amerada to respondent in this case were required to be made quite apart from any accountant-client privilege. As a publicly-held corporation, Amerada must file accurate and complete financial statements, certified by its independent auditors, with the SEC, if it wishes to continue to have its stock publicly traded. See 15 U.S.C. 78*l* and m; 17 C.F.R. 210.1-02(d).

5. The court of appeals further erred in assuming a conflict between the federal statutes regulating securities and those enforcing revenue collection. Section 7602 of the 1954 Code unequivocally authorizes agents of the Internal Revenue Service to summon and inspect records that may be relevant to their investigation. On the other hand, the securities regulations relate to the duty of listed corporations to file annual audited statements, and the duty of auditors to examine the statements under generally accepted principles of public accounting. The statutes and regulations do not even hint at any duty by the accountants to keep their clients' communications confidential. It would therefore be incongruous to enjoin accountants to do so—particularly since their basic function is to insure that the public is accurately informed.

As the Court made clear in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), it requires a clear statement of congressional purpose to create a special rule that will prevent disclosure of information otherwise

relevant and unprivileged. In *St. Regis Paper Co.* the Court held that Section 9(a) of the Census Act (13 U.S.C. (1958 ed.) 9(a)) preventing the Census Bureau from disclosing census information except in the form of statistical reports, did not curtail the normal investigatory powers of other government agencies. The present case follows a fortiori from *St. Regis Paper Co.*, since the securities laws and regulations do not contain any requirements of confidentiality for accountants.

Even assuming that the court below correctly identified a conflict between the policies underlying the securities laws and the provisions regarding tax enforcement, the resolution of such a conflict lies with Congress and not in the courts. This is particularly true where, as here, the securities laws provide no explicit defense to an Internal Revenue Service summons and a literal reading of the revenue provision directs that the documents be produced. There is no justification for the conclusion that the securities law has somehow repealed or cut back on the scope of the Internal Revenue Service's summons authority.

ARGUMENT

TAX ACCRUAL WORKPAPERS PREPARED BY A CORPORATION'S INDEPENDENT CERTIFIED PUBLIC ACCOUNTANT IN THE COURSE OF REGULAR FINANCIAL AUDITS ARE SUBJECT TO PRODUCTION IN RESPONSE TO AN INTERNAL REVENUE SUMMONS ISSUED UNDER 26 U.S.C. 7602

This case presents a question of great importance to the enforcement of the internal revenue laws against corporations that engage certified public accountants. In refusing to enforce an Internal Revenue summons directing a certified public accountant to produce tax accrual workpapers prepared in connection with its regular financial audits of a publicly-held corporation and its certification of the corporation's financial statements, the court of appeals has created an accountant work-product privilege, which it justified by the rationale of an

accountant-client communications privilege. Its holding threatens to impede the Internal Revenue Service's tax investigations of public corporations. The decision below therefore stands in derogation of this Court's ruling in *Couch* v. *United States*, 409 U.S. 322, 335 (1973), that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases * * *."

Moreover, the significance of the privilege created by the court below is not limited to IRS summons enforcement proceedings. The existence of such a privilege would be relevant to many other disputes between federal agencies and corporations, as well as to the conduct of a grand jury investigation. Indeed, the court of appeals' desire to promote candor between accountant and client could not rationally be limited to questionable transactions having tax significance; it would necessarily extend to transactions questionable by other criteria as well. Even more important, recognizing such a privilege would radically affect private litigation involving corporations.

As we shall discuss in greater detail (pp. 24-27, *infra*), the tax accrual workpapers at issue in this case record the result of the auditor's inquiry with respect to the adequacy of a public corporation's reserve for contingent tax liabilities under generally accepted accounting standards. They include factual information obtained by the auditor from the taxpayer and others with respect to financial transactions, as well as the auditor's analyses of these transactions and its evaluation of the correctness of the various reporting positions taken on the corporation's tax return. Accordingly, they are relevant to a legitimate tax investigation. Although the Internal Revenue Service does not routinely seek these accountants' workpapers,[4] it does request them where necessary fac-

[4] The Internal Revenue Manual instructs agents that before requesting information pertaining to the tax accrual account, they should "first exhaust all reasonable means to secure this information from the corporate officer before looking to the independent auditor to provide the information." *Guidelines for Requesting*

tual data pertinent to a corporation's tax liability cannot be obtained from the taxpayer's books of account. Tax accrual workpapers therefore constitute a valuable source of relevant evidence in determining the tax liabilities of the nation's largest corporations.

The refusal of the court below to enforce the summons on the ground of a purported privilege it found to exist for accountants' tax accrual workpapers is contrary to the well-established rule that "[e]videntiary privileges in litigation are not favored." *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979). Indeed, as the Court reaffirmed in *Trammel* v. *United States*, 445 U.S. 40, 50 (1980), quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950), any claim of privilege must overcome the settled principle that "the public * * * has a right to every man's evidence.'" Accord: *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). See also *Blackmer* v. *United States*, 284 U.S. 421, 438 (1932); 8 J. Wigmore, *supra*, § 2192, at 73. Because testimonial privileges hide relevant evidence and therefore tend to be "an obstacle to the administration of justice" (*id.* § 2192, at 73; see *United States* v. *Nixon*, *supra*, 418 U.S. at 711-713), such privileges are tolerable only when they "are designed to protect weighty and legitimate competing interests" (*id.* at 709). See also *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

These considerations are fully applicable to the summons authority of the Internal Revenue Service. Our self-reporting tax system is premised upon the assumption that the majority of taxpayers will honestly report their income and deductions. But Congress has long recognized that if the Treasury is to discharge effectively

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Audit or Tax Accrual Workpapers, [Audit] 1 Int. Rev. Man. (CCH) ¶ 4024.4 (May 14, 1981).

its duty to administer and enforce the internal revenue laws (26 U.S.C. 7801), it must have the statutory power to obtain information with respect to persons who may not have complied with the tax laws.

A. Congress has given the Internal Revenue Service authority to obtain information relevant to its tax investigations

1. Sections 7601 and 7602 of the 1954 Internal Revenue Code (26 U.S.C.) (pp. 2-3, *supra*) provide the Treasury with the authority necessary to support vigorous and searching investigations of taxpayers' liabilities for tax. The former provision imposes upon the Secretary the duty "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." "[T]he section thus flatly imposes upon the Secretary the duty to canvass and to inquire" *Donaldson* v. *United States*, 400 U.S. 517, 523-524 (1971). Section 7602 empowers the Secretary to require the submission of records and testimony for that purpose. It authorizes the Secretary "[t]o summon * * * any * * * person * * * to appear * * * and to produce such books, papers, records, or other data * * * as may be relevant or material" to ascertaining the correctness of any return. "The purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records." *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975).

Section 7602 is the Treasury's principal information-gathering authority, and this Court has construed it broadly to achieve its purpose—effective investigations. Thus the Court has frequently analogized the summons power to the common law duty attaching to the issuance of a testimonial summons. See *United States* v. *Bisceglia*, *supra*, 420 U.S. at 147-148; *United States* v. *Powell*, 379 U.S. 48, 57 (1964). This common law duty has been ex-

pansively construed and is normally limited only by notions of relevance and by certain well cabined doctrines of privilege. See, *e.g.*, *Blair* v. *United States*, 250 U.S. 273 (1919); *United States* v. *Bryan*, *supra*, 339 U.S. at 331. Although the Court has recognized that there may be exemptions from the public duty to give evidence to a competent authority, the "primary assumption" is that a summoned party must "give what testimony one is capable of giving" absent an exemption "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth" (*ibid.*).

Moreover, the Court has consistently construed the summons authority Congress conferred in Section 7602 to embrace all appropriate measures for enforcement, repeatedly rejecting attempts to circumscribe the effective exercise of the Internal Revenue summons power. The Court has upheld summons for tax-related accountant's workpapers, whether in the possession of the taxpayer's accountant (*Couch* v. *United States*, *supra*) or the taxpayer's attorney (*Fisher* v. *United States*, 425 U.S. 391 (1976)). See also *United States* v. *Powell*, *supra*, 379 U.S. at 57; *United States* v. *Bisceglia*, *supra*; and *United States* v. *Euge*, 444 U.S. 707 (1980). "There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes" (444 U.S. at 715-716; footnote omitted). An Internal Revenue Service summons to produce evidence relevant to a legitimate investigation is enforceable unless an established privilege protects such evidence or there are "unambiguous directions from Congress" to the contrary. *United States* v. *Bisceglia*, *supra*, 420 U.S. at 150.

2. As the Court observed in *Donaldson* v. *United States*, *supra*, 400 U.S. at 535, the history of Section 7602 confirms our submission that the statute authorizes the use of a summons to compel the production of documents prepared by an accountant that may be material

in determining tax liability.[5] The statutory history shows that the summons power was derived from Sections 3614, 3615(a)-(c), and 3654 of the Internal Revenue Code of 1939 (see Table II to 1954 Code, 68A Stat. 969) and that these three provisions had independent roots in revenue acts dating back to 1919, 1864, and 1868, respectively. These three sections of the 1939 Code are highly significant because, in adopting Section 7602, Congress intended "no material change from existing law." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A436 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 617 (1954). See also H.R. Rep. No. 1337, *supra*, at 99; S. Rep. No. 1622, *supra*, at 133; 100 Cong. Rec. 3425 (1954).

Section 3614(a) of the 1939 Code authorized the Commissioner "to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and [to require] * * *the attendance of any other person having knowledge in the premises, and [to] take his testimony with reference to the matter required by law to be included in such return * * * ."[6]

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[5] The tax accrual workpapers prepared by respondent fit comfortably within the statutory phrase "any books, papers, records, or other data * * *." Section 7602(1). Moreover, the statutory summons power of the Internal Revenue Service unquestionably extends to accountants who are or may have been engaged by the taxpayer. Section 7602(2) broadly authorizes the Service to summon "any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * *, or any other person the Secretary may deem proper, to appear * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *."

[6] The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919. Act of Feb. 24, 1919, ch. 18, Section 1305, 40 Stat. 1142. As evidenced by Section 3654 of the 1939 Code, which had its origins in 1868 (pp. 19-20 n.8, *infra*), similar authority had been previously granted to the collectors. This authority was likewise continued.

The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of Nov. 23, 1921, ch. 136, Section

Section 3615(a) empowered the collector to "summon any person to appear * * * and to produce books * * *, and to give testimony or answer interrogatories * * * respecting any objects or income liable to tax or the returns thereof * * *." Section 3615(c)(2) and (3) extended the summons power to "any other person having possession, custody, or care of books of account containing entries relating to the business of any person * * *" or "[a]ny other person the collector may deem proper."[7] Finally, the third source for the present summons authority—Section 3654(a) of the 1939 Code—conferred upon the collectors the "power to examine all persons, * * * books and papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him * * *."[8]

1308, 42 Stat. 310; Act of June 2, 1924, ch. 234, Section 1004, 43 Stat. 340; Act of Feb. 26, 1926, ch. 27, Section 1104, 44 Stat. 113; Act of May 29, 1928, ch. 852, Section 618, 45 Stat. 878.

[7] Section 3615(a)-(c) of the 1939 Code closely followed a provision first adopted in 1864, Act of June 30, 1864, Section 14, 13 Stat. 226, and reenacted several times prior to its codification in 1939. Act of July 13, 1866, ch. 184, Section 9, 14 Stat. 101; Act of Dec. 24, 1872, ch. 13, Section 1, 17 Stat. 401. In 1874, the provision was codified as part of Section 3173 of the Revised Statutes (1878 ed.), which was amended by Act of Mar. 1, 1879, ch. 125, Section 3, 20 Stat. 330-331, Act of Aug. 27, 1894, ch. 16, Section 34, 28 Stat. 557; Act of Oct. 3, 1913, ch. 16, Subsec. I, 38 Stat. 177; Act of Sept. 8, 1916, ch. 463, Section 16, 39 Stat. 773; Act of Feb. 24, 1919, ch. 18, Section 1317, 40 Stat. 1146; Act of Nov. 23, 1921, ch. 136, Section 1311, 42 Stat. 311; Act of June 2, 1924, ch. 234, Section 1018, 43 Stat. 344; Act of Feb. 26, 1926, ch. 27, Section 1115, 44 Stat. 117.

[8] Section 3654 of the 1939 Code was derived from an essentially identical provision first enacted in 1868, Act of July 20, 1868, ch. 186, Section 49, 15 Stat. 144, and codified as part of Section 3163 of the Revised Statutes of 1874 (1878 ed.).

Table II of the 1954 Code, 68A Stat. 969, states that Sections 3614 and 3615(a)-(c) of the 1939 Code were essentially carried forward into Section 7602 of the 1954 Code. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 535. Although Table II does not

By combining Sections 3614, 3615 and 3654 into Section 7602 in 1954 without intending to change existing law, Congress affirmed the use of an Internal Revenue summons to compel the appearance and testimony of all persons who could further an investigation leading to the discovery of all those who may be liable for unpaid taxes. Like Section 7602, the prior provisions defined the summons power in the broadest possible manner, using terms such as "books, papers, records, or memoranda bearing upon the matters required to be included in the return"; "require the attendance of any * * * person having knowledge in the premises"; "to summons any person to appear * * * to give testimony or answer interrogatories," and "to examine all persons, books, papers, accounts, and premises."

3. Thus, the history as well as the text, of both the current provision and its authoritative predecessors, confirm the correctness of this Court's statement in *United States* v. *Euge*, *supra*, 444 U.S. at 712, that the testimonial requirement imposed by Section 7602 is "an expansive duty limited principally by relevance and privilege."[9] Here, both courts below found that the tax ac-

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contain a reference to Section 3654(a) of the 1939 Code, that provision is likewise necessary as an aid to understanding the current scope of the summons power because of Congress' stated intention not to change existing law. Moreover, there was no need to continue the summons authority to collectors because the office of collector had been abolished (26 U.S.C. 7804). Pursuant to Sections 7801 and 7802 of the 1954 Code, the authority to enforce the revenue laws was vested in the Secretary of the Treasury and the Commissioner of Internal Revenue.

[9] For purposes of this case, the other requirements for enforcement of an Internal Revenue Service summons have been met and are not at issue. Thus, the Internal Revenue Service must demonstrate that the investigation is conducted for a legitimate purpose, the information sought may be relevant and is not already in the Internal Revenue Service's possession, and the administrative steps prescribed by the Internal Revenue Code have been followed. *United States* v. *Powell*, *supra*, 379 U.S. at 57-58. In practice, these re-

crual workpapers sought from respondent were "relevant" to the inquiry the IRS was conducting under Section 7602. The plain language of Section 7602 thus requires the courts to uphold the summons to produce them. The court of appeals nevertheless refused to order production on the unprecedented ground that the "integrity of the auditing process" requires that a "privilege be carved out" (Pet. App. 31a) insulating these papers from summons in the absence of some extraordinary showing of need.

As we shall show, the creation of this new privilege was unwarranted, and rested on significant errors in the court's analysis. However, before we turn to a detailed discussion of the decision below and to the question of privilege, we deem it important to describe the nature and contents of tax accrual workpapers of the sort at issue in this case. An understanding of the character of such papers will confirm that they are not only fully relevant —as the courts below correctly acknowledged—but also that they should not be insulated from disclosure by a newly-invented evidentiary privilege.

B. Tax accrual workpapers contain evidence that is unquestionably relevant to the Internal Revenue Service's tax investigations

1. Every publicly-held corporation engages independent auditors who are qualified as certified public accountants to conduct regular financial audits of its books and to certify its financial statements. These regular financial audits generate audit workpapers and tax accrual workpapers. As the court of appeals observed with respect to the first category of documents referred to as audit workpapers, these papers "consist almost entirely of factual

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quirements are met by an affidavit from the agent issuing the summons, which states that the investigation has civil purposes and that the summons was issued prior to a recommendation for criminal prosecution, and further recites that the other requirements prescribed by *Powell* have been met.

data generated from the books when accountants verify the financial statements prepared by Amerada's own personnel by spot-checking selected bookkeeping entries and records" (Pet. App. 21a). The court further added that these audit workpapers "include third-party confirmations of transactions, as well as the auditor's own judgments about the implications of the company's transactions. Some of the workpapers contain material learned during confidential discussions between Amerada and [Arthur Young] employees" (*ibid.*).

But the fact that the audit workpapers contained information that was treated as confidential between Amerada and its outside auditor did not put such documents beyond the reach of the Internal Revenue summons. In enforcing the summons requiring the production of the audit workpapers, the court of appeals concluded that "it is clear that the audit workpapers pass the *Powell* test" (Pet. App. 23a). In so ruling, it relied upon its prior ruling in *United States* v. *Noall*, 587 F.2d 123 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979), enforcing a summons to produce internal audit workpapers. Finding no meaningful distinction between the internal audit workpapers in *Noall* and the external audit workpapers at issue in this case, the court reaffirmed its statement in *Noall* that "the purposes of the internal audit include the detection of overstatements or understatements of revenues or expenses, and of identifying accounting procedures that would lead to these. If the internal auditors have ascertained an understatement of revenues or an overstatement of expenses, this plainly might throw light on the correctness of the returns" (587 F.2d at 126).

2. The court of appeals' observations with respect to the relevance of the audit workpapers are equally applicable to the tax accrual workpapers whose production it refused to order. The tax accrual account (also known as the tax pool analysis, the noncurrent tax account, or the tax pool) is a reserve account that appears on the liability side of the corporate balance sheet. This account

reflects the sum of contingent tax liabilities relating to the tax treatment of transactions occurring in prior years that may give rise to possible, but not agreed to, adjustments in the corporation's tax liabilities for those years. E. Kohler, *A Dictionary for Accountants* 119-120 (5th ed. 1975). See also G. Johnson & J. Gentry, *Finney and Miller's Principles of Accounting (Intermediate)* 117-118 (7th ed. 1974). The purpose of the accountant's examination of the account is to determine the adequacy and reasonableness of that reserve. N. Lenheart & P. Defliese, *Montgomery's Auditing* 508 (8th ed. 1957).

Both courts below correctly concluded that respondent's tax accrual workpapers were relevant to the Service's investigation of Amerada (Pet. App. 6a-8a; *id.* at 27a).[10] As the court of appeals observed, "we have consistently used as our test of relevance whether the documents requested 'might have thrown light upon' the correctness of a return" [citations omitted]. The documents at issue here certainly pass this low threshold of relevance. Different tax positions lead to different amounts of liability. It is difficult to say that the assessment by the independent auditor of the correctness of positions taken by the tax-

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[10] Both courts below rejected respondent's arguments that (1) only documents actually used in the preparation of federal income tax returns are relevant, and (2) documents sought from any third party are subject to an even higher threshold of relevance. In so holding, they relied on *United States* v. *Noall*, 587 F.2d 123 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979), which ruled that even documents not used in tax return preparation may, nevertheless, be relevant to an Internal Revenue Service audit as long as the documents might throw some light on the correctness of the return. *Id.* at 125. But cf. *United States* v. *Coopers & Lybrand*, 413 F. Supp. 942 (D. Colo. 1975), aff'd, 550 F.2d 615 (10th Cir. 1977). See p. 39 n.23, *infra*. The court of appeals further held that even assuming that a higher threshold of relevance might apply to records in the hands of a third party who was in fact a stranger to the taxpayer, respondent could not claim protection under such a rule because it had been and continued to be intimately involved in Amerada's financial and tax affairs (Pet. App. 22a).

payer in his return would not throw 'light upon' the correctness of the return" (*id.* at 27a).[11]

3. As the name implies, tax accrual workpapers consist of an amalgam of various sorts of materials bearing on the adequacy and reasonableness of the contingency reserves established by a corporation with respect to its tax liabilities.

(a) These papers will, of course, contain or refer to large bodies of factual information about the corporation's financial transactions that are relevant to its tax liabilities. The data will come not only from the corporation's books but also from information gathered from the corporation s employees and from third parties.

Some of these data may in fact be readily available on an ordinary audit of the corporation's books. But not necessarily all of it. The data may include facts that do not appear on the taxpayer's returns or the supporting schedules or attachments and that may not come to the attention of the IRS during a normal audit of the taxpayer's books. For example, a multinational corporate client may provide its accountant with facts about the income, expenses, and level of bona fide business activity of an off-shore subsidiary that the client does not include in its tax return. An appraisal of the facts may suggest the necessity for the Commissioner to make pricing adjustments under Section 482, the existence of Subpart F (Sections 952 *et seq.*) income, or other adjustments that may require assessment of additional taxes against the U.S. parent. These are typical and frequently arising issues in a multinational corporate tax audit. And these facts may very well not be readily available on a routine IRS audit; if discovered, they may, however, cast serious doubt on the propriety of the decision not to report, and may lead the independent auditor to recom-

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[11] "The statutory language [of Section 7602(2)] is 'may be relevant or material.' Congress acted advisedly in using the verb 'may be' rather than 'is,' since the Commissioner cannot be certain that the documents are relevant or material until he sees them." *United States* v. *Noall*, *supra*, 587 F.2d at 125.

mend the establishment of a tax reserve against the contingency that the facts will be uncovered and additional taxable income and deficiencies determined.

(b) The tax accrual workpapers may also shed important light on the taxpayer's state of mind regarding the treatment it ultimately presents on its tax returns. If the taxpayer chooses to disregard the accountant's opinion that the Code and Regulations require an item to be reported in a certain manner and presents the transaction in a way likely to mislead the Internal Revenue Service, the taxpayer runs the risk of being held liable for the penalty provided by Section 6653(a) of the 1954 Code for "intentional disregard of rules and regulations" and may also be liable for an additional fraud penalty.[12] 26 U.S.C. 6653(b). Thus, the accountant's appraisal may bear on the taxpayer's liabilities for these penalties.[13]

(c) Furthermore, as any sophisticated lawyer or accountant knows, there is a vast difference between "raw" data and "organized" data. The *point* of the tax accrual workpaper process is to organize the facts; the papers

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[12] The court of appeals apparently believed that tax accrual workpapers should be protected "so long as a case does not involve allegations of fraud" (Pet. App. 31a). But as this Court recognized in *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 308-309, the purpose of a tax investigation is to determine all relevant facts that may establish a basis for additional taxes, the imposition of the fraud penalty, or even criminal prosecution. Most cases begin as routine audits, not as fraud investigations. Hence, Section 7602 necessarily permits the use of a summons at the very outset of the investigation for the purpose of uncovering the basic facts necessary for a determination of the taxpayer's correct liability, including liability for the fraud penalty.

[13] The 1982 amendments to the Internal Revenue Code of 1954 (to be codified in 26 U.S.C.) added additional penalties that make the taxpayer's state of mind even more relevant to an income tax investigation. See Pub. L. No. 97-34, 95 Stat. 341 (Section 6659) (Addition to Tax in the Case of Valuation Overstatements); Pub. L. No. 97-248, 96 Stat. 324 (Section 6661 (Substantial Understatement of Liability); Section 6700 (Promoting Abusive Tax Shelters); and Section 6701 (Penalties for Aiding and Abetting Understatement of Tax Liability).

will in effect embody the taxpayer's and the accountant's judgments about which facts are *relevant* to the taxpayer's lawful tax liability.

In the case of a taxpayer with billions of dollars of revenues arising from untold numbers of intricate transactions, the integrity of a self-reporting tax system comes under special strain. The fact that a needle is there, present in the haystack, is not enough—the summons authority extends as well to available tools for discovering it. And since it is the taxpayer's duty to report the needle in its return, and the accountant's duty to discover whether there may be unreported needles, their judgments about what constitutes a needle—about which facts are relevant to the taxpayer's lawful tax liabilities—are not entitled to be cloaked in secrecy.

It is in this sense that tax accrual workpapers may be characterized as a roadmap (to use the figure employed by the court of appeals (Pet. App. 31a))—a roadmap through the raw data. They organize the terrain under standards of relevance derived from the necessity to certify the taxpayer's financial statements. And the fact that the roadmap has been created by the taxpayer and the accountant—rather than the IRS itself—does not meaningfully distinguish it from other data amenable to summons or justify enshrouding it in secrecy.

(d) Finally, tax accrual workpapers may also contain the accountant's—and, indirectly, the taxpayer's—opinions and judgments about the propriety of the corporation's reporting positions and about the potentials for and strength of an IRS challenge to those positions. These opinions and judgments will, of course, be inextricably mixed in with factual data and characterizations of the factual data. So also, of course, the taxpayer's return is an amalgam of facts, opinions and judgments.

The purpose of obtaining tax accrual workpapers is not primarily to allow the Service access to the accountant's and the taxpayer's "opinions" and "theories" about what is the correct tax liability. Once the relevant facts

are brought to its attention, the Service will make its own appraisal. The Service's chief interest is to discover all of the relevant facts—and these workpapers may be of critical importance in allowing it to do so.

It may, however, be the case that in a given instance the papers will help the investigating agent by highlighting the vulnerabilities of the taxpayer's positions and by suggesting alternative theories with respect to the appropriate tax treatment of a given transaction. But, absent any evidentiary privilege barring production of such documents (see pp. 28-39, *infra*), disclosure of the accountant's appraisals is consistent with the policy that the audit process and the attendant summons procedure "is to determine the truthful scope of the taxpayer's liability, rather than to engage in a sophisticated game of hide and seek." *United States* v. *Price Waterhouse & Co.*, 515 F. Supp. 996, 1000 (N.D. Ill. 1981). See also *United States* v. *McKay*, 372 F.2d 174, 176 (5th Cir. 1967).

As the Fifth Circuit noted in *United States* v. *El Paso Co.*, 682 F.2d 530, 534 (1982), the number of potential disputes over the tax treatment of items by a large corporation is "enormous." For fiscal year 1981, while corporate returns constituted 6.1% of returns examined, 60.3% of the dollar deficiencies (totalling $4.33 billion) proposed, involved corporate taxes. Commissioner of Internal Revenue and the Chief Counsel for the Internal Revenue Service. *1981 Annual Report* 12-13. The task facing the Internal Revenue Service in insuring compliance with the tax law is correspondingly enormous and should not be stultified by limiting access to relevant material in the absence of compelling factors. See *Donaldson* v. *United States*, *supra*, 400 U.S. at 535-536; *United States* v. *El Paso Co.*, *supra*, 682 F.2d at 545.

To be sure, Amerada may find disclosure of respondent's tax accrual workpapers to be disagreeable. "The divulgence of potentially incriminating evidence against [the taxpayer] is naturally unwelcome. But [the tax-

payer's] distress would be no less if the divulgence came not from [its] accountant but from some other third party with whom [it] was connected and who possessed substantially equivalent knowledge of [its] business affairs." *Couch* v. *United States*, *supra*, 409 U.S. at 329.

If Amerada had sought to obtain a substantial line of credit from a bank which, as a condition of advancing the credit, had engaged an accountant to conduct an independent audit of Amerada, neither that auditor, nor Amerada, nor its own regular auditor, could seriously contend that tax accrual workpapers generated in such an audit would be immune from compelled disclosure pursuant to an IRS summons. Like any other third-party evidence, the bank's papers and those of its outside auditor would be subject to disclosure. See *Donaldson* v. *United States*, *supra*, 400 U.S. at 535-536.

There is, we submit, no significant difference between the foregoing example and the tax accrual workpapers at issue here, because—as we shall now show—nothing in the relationship between Amerada and its independent auditor, respondent Arthur Young & Co., warrants the creation of an evidentiary privilege barring the production of such concededly relevant evidence. "* * * [T]his Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibility to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." *United States* v. *Euge*, *supra*, 444 U.S. at 711. No such statutory policies or countervailing policies bar the production of the papers at issue.

C. The tax accrual papers are not protected from disclosure by either a work-product privilege or an accountant-client privilege

1. In refusing to order production of the tax accrual workpapers prepared by respondent in connection with its determination of the adequacy of Amerada's reserve for

contingent tax liabilities and its certification of Amerada's financial statements, the court of appeals relied upon the attorney work-product doctrine established by this Court's decision in *Hickman* v. *Taylor*, 329 U.S. 495 (1947). In *Hickman*, the Court recognized a qualified privilege against pretrial discovery for certain materials prepared by an attorney "acting for his client in anticipation of litigation" (329 U.S. at 508). See *United States* v. *Nobles*, 422 U.S. 225, 236-240 (1975); *Upjohn Co.* v. *United States*, 449 U.S. 383, 397-399 (1981). In so holding, the Court expressed the view that a lawyer should have "a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel" so that he may "prepare his legal theories and plan his strategy without undue and needless interference" (*Hickman* v. *Taylor*, *supra*, 329 U.S. at 510-511).

a. The policies underlying the *Hickman* rationale demonstrate that the work-product doctrine should not be extended from lawyers to accountants. Indeed, we are aware of no case, apart from the decision below, that has proposed such an extension. The fact that the law has recognized an attorney work-product privilege but not an accountant work-product privilege rests on important practical differences between the function of an accountant and that of an attorney. The attorney is the client's confidential advisor, and an advocate whose duty it is to present the client's case to the whole world in the most favorable light possible.[14] An independent certified public accountant

[14] There are, of course, certain ethical restrictions imposed upon an attorney in the conduct of his advocacy. For example, Disciplinary Rule 7-102(A) of the Model Code of Professional Responsibility (1976) forbids the knowing use of perjured testimony or false evidence, or counseling a client to engage in illegal or fraudulent conduct. But section (B) of that same rule prohibits revealing even perjury to the relevant tribunal if the attorney's knowledge of the perjury rests on privileged communications, *i.e.*, from the client. Moreover, Ethical Consideration 7-4 requires the attorney to urge any construction of law or facts favorable to his client if the construction is "*supportable* by a good faith argument for an exten-

performs a sharply different function. As the title implies, he reports not to the client but to the public. He does not serve as the client's private and confidential advisor, but rather as an instrument of public oversight. The law shields the mental processes of the attorney because the product of those processes—the rendering of thoughtful legal advice—has long been deemed to be entitled to privacy. But the product of the accountant's mental processes is in no way designed to be private advice. It is designed to constitute a public report on the adequacy of the client's financial disclosures. There is no doubt whatever that if respondent had concluded that Amerada's tax reserves were inadequate, it would have been duty-bound publicly to disclose that opinion, presumably through a qualification in its certification. There is, therefore, no good reason to cloak in privacy the facts and analytical processes that led to the very judgment that all concede must be fully disclosed to the public as a public judgment.

An attorney, however, is not supposed to be "independent" of the client. His duty is to give the client undivided loyalty. On the other hand, the independent certified public accountant—again as the title implies—is meant to be "independent." His responsibility is not only to the client whose books he is auditing but also to various governmental agencies regulating his client's industry, to his client's creditors, and to investors in his client's securities. Thus, ET Section 52 of the Code of Ethics adopted

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sion, modification, or reversal of the law" (emphasis added), *i.e.*, even if the attorney himself does not believe in the argument. Model Code of Professional Responsibility 36C, 32C (1976). See also Rule 1.6 Model Rules of Professional Conduct (Proposed Final Draft 1981), dealing with confidentiality of information. Model Rules of Professional Conduct 9 (Final Draft 1982). The ABA House of Delegates amended this proposal to protect against disclosure of information by an attorney that his client is about to commit a nonviolent crime (*e.g.*, fraud), but the ABA itself has not taken final action on the proposed rules. See N.Y. Times, Feb. 9, 1983, at A24, col. 1.

by the American Institute of Certified Public Accountants states that "[*A*] *certified public accountant should maintain his integrity and objectivity and when engaged in the practice of public accounting, be independent of those he serves.*" *AICPA-Professional Standards* 4291 (1982; emphasis in original). The independent public accounting firm is expected to maintain financial as well as mental independence from the client. Neither the firm nor its employees is permitted any direct or indirect interest in the client (ET Section 101, AICPA, *supra*, at 4411-4412) and its attitude to the client should be "a judicial impartiality that recognizes an obligation for fairness not only to management and owners (shareholders) of a business, but also to creditors and those who may otherwise rely (in part, at least) upon the auditor's report, as in the case of prospective owners or creditors" (R. Wixon, W. Kell & N. Bedford, *Accountants' Handbook* 26.10 (5th ed. 1970) [hereinafter cited as *Accountants' Handbook*], quoting AICPA Committee on Auditing Procedure (Statement on Auditing Procedure No. 33)).

The independence of an outside accounting firm, when it is engaged to render an opinion on financial statements (as respondent was in this instance), requires that it avoid not only outright misstatements or omissions but also "any type of presentation that would tend to favor the client company at the expense of those who read and rely on the financial statements examined" (*Accountants' supra*, at 26.10). See also *Gold* v. *DCL Inc.*, 399 F. Supp. 1123 (S.D.N.Y. 1973). Its responsibilities to the public require it to inform the public when the client has not presented its financial status fairly, by qualifying its opinion. *Accountants' Handbook, supra*, at 26.27. Finally, in contrast to the attorney's qualified duty to correct frauds on the court provided his knowledge does not come through privileged client communications (DR 7-102(B) Model Code of Professional Responsibility, *supra*), the independent public accountant has a continuing duty to inform the public of misstatements or errors in

the client's audited statements when the accountant has certified them. "The accountant owes a duty to the public not to assert a privilege of silence until the next audited annual statement comes around in due time." *United States* v. *Natelli*, 527 F.2d 311, 319 (2d Cir. 1975).[15]

The public accountant's multiplicity of loyalties exposes accountants to suits by regulatory agencies, creditors, and investors on the theory that the accountant ignored his duty to them in favor of his loyalty to his client. In such suits, it is common for accountants to disclose their clients' confidential communications and their own work product in order to demonstrate that they properly discharged their duties to all.[16] Indeed, it was precisely those differences between accountants and attorneys that this Court recognized in *Couch* in rejecting an analogous claim of an accountant-client privilege as to a taxpayer's records turned over to an accountant. As the Court stated (409 U.S. at 335-336):

> [T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not * * * [the taxpayer's]. Indeed,

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[15] See Note, *The Duties and Obligations of the Securities Lawyer: The Beginning of a New Standard for the Legal Profession?*, 1975 Duke L. J. 121, for a detailed analysis of the distinction between the roles of lawyers and accountants and the unique responsibilities to the public imposed on securities lawyers by the courts and by the regulations of the Securities and Exchange Commission.

[16] See, *e.g.*, *Pegasus Fund, Inc.* v. *Laraneta*, 617 F.2d 1335 (9th Cir. 1980) (respondent Arthur Young & Co. produced its workpapers to show that it had no reason to know of fraud by its client); *Oleck* v. *Fischer*, 623 F.2d 791 (2d Cir. 1980) (Arthur Andersen & Co. testified regarding reserves for notes payable appearing in client's financial statement); *Herzfeld* v. *Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976); *SEC* v. *Geotek*, 426 F. Supp. 715 (N.D. Cal. 1976), aff'd, 590 F.2d 785 (9th Cir. 1979).

> the accountant risks criminal prosecution if he willfully assists in the preparation of a false return. * * * His own need for self-protection would often require the right to disclose the information given him. * * * Accordingly, * * * [the taxpayer] cannot reasonably claim * * * an expectation of * * * privacy or confidentiality.

Given the independence of the certified public accountant from his client, and given the fact that his function is to make public reports rather than to give confidential advice, it is plain that the *Hickman* doctrine should not apply to the accountant's workpapers. Privacy is accorded to a lawyer in the preparation of his legal theories and strategy because they are undertaken for the sole benefit of his client and because we want clients to have access to confidential legal advice. In contrast, the accountant's opinion of the adequacy of the tax contingency reserve account is designed to be public knowledge for the benefit of a public corporation's creditors, investors, and the Securities and Exchange Commission. There is therefore no policy justification under the *Hickman* rationale for enshrouding in secrecy the facts and interpretations which lead to that publicly-available judgment by the accountant.

b. The work-product doctrine is also inapplicable to the accountant tax accrual workpapers because they were prepared in the course of a regular audit of financial statements and not in connection with litigation no matter how remotely contemplated.[17] According some degree of confidentiality to lawyers' work product prepared in connection with litigation is consistent with "the public policy underlying the orderly prosecution and defense of legal claims." *Hickman* v. *Taylor*, *supra*, 329 U.S. at

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[17] The work-product doctrine would, of course, protect workpapers that an accountant prepares when engaged by an attorney in preparation for litigation. *In re Grand Jury Subpoena*, 599 F.2d 504, 513 (2d Cir. 1979); cf. Fed. R. of Civ. P. 26(b)(3), advisory committee.

510. If such materials were open to opposing counsel on demand, the Court in *Hickman* concluded that "Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial" (*id.* at 511). The result would be that counsel would be able to derive advantage from the efforts of his opponent.

These policies have no bearing upon the instant case because the papers at issue were not prepared in connection with litigation. Rather, the tax accrual workpapers were prepared to comply with the regulations of the Securities and Exchange Commission. See *United States* v. *El Paso Co.*, 682 F.2d 530 (1982), petition for cert. pending, No. 82-716 (tax accrual analyses prepared by house counsel not work product because they were not prepared with even the remotest contemplation of litigation). 682 F.2d at 542-544.

Neither respondent nor Amerada claims that the tax accrual workpapers would qualify as traditional work product, and the record fails to support any inference that litigation was, in fact, contemplated when these workpapers were created. As codified in Fed. R. Civ. P. 26(b), the work-product doctrine protects against discovery "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party *concerning litigation*" (emphasis added). It does not protect the mental impressions, etc. of anyone, including an attorney, if they do not concern litigation. Rather, the rule contemplates that "documents not obtained or prepared with an eye toward litigation" should be freely produced on a showing of relevance. See Fed. R. Civ. P. 26(b) advisory committee notes. Accord: *Coastal States Gas Corp.* v. *Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) ("[work-product doctrine] has uniformly been held to be limited to documents prepared in contemplation of litigation"); *Goosman* v. *A. Duie Pyle, Inc.*, 320 F.2d 45, 52 (4th Cir. 1963) (reports prepared in ordinary course of business under Interstate

Commerce Commission regulations are not work product). Accordingly, the attorney work-product privilege, whether founded on *Hickman* v. *Taylor*, or on Rule 26(b)(3), does not extend to respondent's tax accrual workpapers.

2. Although the court of appeals cited *Hickman* v. *Taylor*, *supra*, 329 U.S. at 495, as the principal authority in support of its decision, it is plain that its reasoning was not primarily based on the *Hickman* rationale. Rather, the court's concern focused on fostering candid communications from client to accountant. As the court of appeals stated, "The prejudice involved in exposing to the Service appraisals of a taxpayer's weaknesses and settlement positions on audits is of such proportions that a prudent organization might not be perfectly candid with independent auditors once it knew that the information revealed would be reachable under § 7602" (Pet. App. 30a).

The court's emphasis on candid communications between client and accountant—for the supposed benefit of the investing public and the enforcement of the securities laws—indicates that the court was establishing the basis for a communications privilege. *Upjohn Co.* v. *United States*, *supra*, 449 U.S. at 389; *United States* v. *El Paso Co.*, *supra*, 682 F.2d at 541 n.13; *In re Sealed Cases*, 676 F.2d 793, 808-809 (D.C. Cir. 1982). But this Court and every court that has considered the issue (apart from the court below) has rejected the creation of an accountant-client privilege. *Couch* v. *United States*, *supra*, 409 U.S. at 335.

In *Couch*, the Court ruled that the Fifth Amendment rights of a taxpayer were not violated by the enforcement of a documentary summons directed to her accountant and requiring production of the taxpayer's own records in the possession of the accountant. It did so on the ground that in such a case "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329). In so holding, the Court rejected the taxpayer's argument that "the confidential nature of the accountant-

client relationship and her resulting expectation of privacy in delivering the records protect[ed] her, under the Fourth and Fifth Amendments, from their production" (409 U.S. at 335). The Court flatly stated, "Although not in itself controlling, we note that no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases" (*ibid.*).[18]

The reasons underlying the judicial rejection of an accountant-client communication privilege derive from the distinctions between lawyers and accountants that we have discussed (pp. 29-35, *supra*) in connection with the attorney work-product doctrine. The lawyer's work product and the communications between lawyer and client are protected from compelled disclosure because the lawyer owes undivided loyalty to champion his client's interests against all others and because the relationship is meant to be confidential.[19] The accountant, however, makes public judgments and reports based on a duty to the public and to public law enforcement bodies. The

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[18] See, *e.g.*, *Wm. T. Thompson Co.* v. *General Nutrition Corp.*, 671 F.2d 100, 103-104 (3d Cir. 1982); *United States* v. *Gurtner*, 474 F.2d 297, 299 (9th Cir. 1973); *United States* v. *Wainwright*, 413 F.2d 796, 803 (10th Cir. 1969); *United States* v. *Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *Falsone* v. *United States*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953). See also *Gariepy* v. *United States*, 189 F.2d 459, 463-464 (6th Cir. 1951); *Himmelfarb* v. *United States*, 175 F.2d 924, 939 (9th Cir.), cert. denied, 338 U.S. 860 (1949); *Olender* v. *United States*, 210 F.2d 795, 806 (9th Cir. 1954).

[19] The attorney may reveal confidential communications if the client sues him about the quality of representation (*Tasby* v. *United States*, 504 F.2d 332, 336 (8th Cir. 1974)), or if the communication was made in furtherance of on-going or future criminal activity and the attorney's defense against criminal prosecution regarding the criminal activity requires disclosure of the communication (*Housler* v. *First Nat'l Bank of East Islip*, 484 F. Supp. 1321 (E.D.N.Y. 1980)). Cf. *Myerhoffer* v. *Empire Fire & Marine Insurance Co.*, 479 F.2d 1190 (2d Cir. 1974) (attorney permitted to reveal confidences when he was a defendant in a civil suit involving the securities law).

very purpose of client communications to him is to enable the accountant to exercise his discretion to disclose all relevant information to the public or public agencies. Hence, there is no justification for cloaking in secrecy a client's communications with his accountant, and the accountant's tax accrual papers should not be protected by either a work-product or a communications privilege.

3. In light of the foregoing, it is not surprising that no other court has protected tax accrual workpapers from an Internal Revenue summons on the ground of privilege or policy. In *United States* v. *El Paso Co.*, *supra*, the Fifth Circuit enforced an Internal Revenue summons for tax accrual workpapers prepared by a public corporation's in-house accountants and attorneys, and communicated to its independent accountants in connection with the establishment of a reserve for contingent tax liabilities and the certification of its financial statements. The court relied on this Court's admonition in *Couch* that there is no federal accountant-client evidentiary privilege, and rejected "[t]he logic of [the decision below that] implies that the taxpayer's revelation of tax accrual workpapers to an accountant should be considered a communication in confidence" (682 F.2d at 540-541).[20]

In *United States* v. *Price Waterhouse & Co.*, 515 F. Supp. 996 (N.D. Ill. 1981), the district court rejected Price Waterhouse's claim that its "thoughts, ideas and

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[20] El Paso resisted the summons arguing, *inter alia*, that because the tax accrual analysis was conducted by employees who were attorneys, the documents were privileged either under the attorney-client privilege or the attorney work-product doctrine. The court assumed that the attorney-client privilege might have been applicable (682 F.2d at 539). However, it enforced the summons because El Paso had discussed the tax accrual analyses with its outside auditors and thereby waived any privilege that might have applied to these records (*id.* at 540). The court held that El Paso waived any presumed attorney-client privilege because no accountant-client privilege existed. By communicating to a non-privileged party —the outside auditor—El Paso forfeited whatever privileged status might have been accorded to the communication.

opinions" (*id.* at 998 n.4) are not subject to an Internal Revenue summons. The court understood Price Waterhouse to be objecting to revealing its thoughts and opinions on issues that the Internal Revenue Service may not have pinpointed on its own in the course of the audit (*ibid.*). But the court concluded that protection of such documents is not justified because it would turn the audit into "a sophisticated game of hide and seek" (*id.* at 1000), in which the accountants would turn material over if the agent guesses right and claim privilege if the agent guesses wrong.[21]

Finally, in *United States* v. *Arthur Andersen & Co.*, 474 F. Supp. 322 (D. Mass. 1979), appeal of one party dismissed, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021, aff'd as to second party, 623 F.2d 725 (1st Cir. 1980),[22] the district court refused to create a privilege to protect Arthur Andersen's tax accrual workpapers. It relied on this Court's opinion in *Couch*, and this Court's

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[21] Compare *United States* v. *Procter & Gamble*, 356 U.S. 677, 682-683 (1958) ("Modern instruments of discovery serve a useful purpose * * *. They together with pretrial procedures make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent * * *. Only strong public policies weigh against disclosure."); see also *Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1345-1346 (5th Cir. 1978).

[22] Neither the corporate taxpayer nor the independent auditor in *Arthur Andersen & Co.* obtained a stay of the district court decision. Hence, the auditor produced the tax accrual papers, and its appeal with respect to that issue was dismissed as moot (623 F.2d 720 (1st Cir. 1980)). The taxpayer's appeal challenged, *inter alia*, the relevance of the Service's questioning the auditor with respect to the workpapers. Before addressing the taxpayer's claim that the requested testimony of the auditor was not relevant, the court of appeals first expressed agreement with this Court's admonition in *Couch* v. *United States*, *supra*, 409 U.S. at 335, that there is no recognized accountant-client privilege. See pp. 5-6, *supra*. The court of appeals held that the taxpayer's appeal as to the relevancy of the auditor's testimony was premature until such questioning was in fact resisted (623 F.2d at 729-730).

broad construction of the Internal Revenue Service's statutory summons power (474 F. Supp. at 327).[23]

D. The rationale for a communications privilege is not applicable to this case

Even if some communications between client and accountant could be deemed privileged, the rationale for such a privilege does not exist in this case. The principal contemporary justification for the attorney-client privilege is its presumed value in encouraging clients to make full disclosure to their attorneys, *Upjohn Co.* v. *United States*, *supra*, 449 U.S. at 389; 8 J. Wigmore, *supra*, §§ 2291 and 2306, at 590. Clients, of course, have no legal duty fully to inform their lawyers; without the privilege, therefore, disclosure might be deterred and it might be difficult to obtain fully informed legal advice. "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures—necessary to obtain legal advice—which might not have been made absent the privilege." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976).

There is no substantial basis for the court of appeals' assumption that the production of tax accrual workpapers would cause corporations to withhold information

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[23] Cf. *United States* v. *Coopers & Lybrand*, 413 F. Supp. 942 (D. Col. 1975), aff'd, 550 F.2d 615 (10th Cir. 1977). There, the court refused to enforce a summons for tax accrual workpapers on the ground that they were not relevant to the Internal Revenue audit, relying, in part, on the fact that they were not created in the course of preparing the taxpayer's tax return. This narrow definition of relevance has not been followed in subsequent decisions of other courts, including the Tenth Circuit itself. *United States* v. *El Paso Co.*, *supra*; *United States* v. *Noall*, 587 F.2d 123, 125-126 (2d Cir. 1978), cert. denied, 441 U.S. 923 (1979); and *United States* v. *Southwestern Bank & Trust Co.*, 693 F.2d 994 (10th Cir. 1982); *United States* v. *City National Bank & Trust Co.*, 642 F.2d 388 (10th Cir. 1981).

from their outside auditors.[24] As a publicly-held corporation, Amerada was required to file accurate and complete financial statements, certified by its independent auditors, with the SEC, if it wished to continue to have its stock publicly traded. See 15 U.S.C. 78*l* and m; 17 C.F.R. 210.1-01, 210.1-02(a), (d), and (f), 210.2-01. Thus, Amerada had an independent legal duty to make full disclosures to respondent, without reference to or encouragement by any privilege. As the dissenting judge pointed out, there is accordingly no justification for the majority's premise "that some corporations are so anxious to minimize their tax payments that they are willing to deceive their accountants concerning the existence of debatable tax items and thereby violate their obligations under the securities law" (Pet. App. 36a; footnotes omitted). See also *United States* v. *El Paso Co.*, *supra*, 682 F.2d at 544.

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[24] There is certainly nothing in the record to support such an inference. The only factual submission put forward by respondent on this point was the unsupported self-serving statement of its counsel that (J.A. 32):

> Clients would be reluctant to provide necessary information * * * [if the tax accrual workpapers were disclosed]. The devastating impact of this to the auditing profession and to the primary objectives of that audit, the integrity of the financial statements, is obvious.

Surely an evidentiary privilege that undercuts the powerful governmental interest in collecting taxes should rest on something more substantial than the self-serving speculation by an interested party. In *Branzburg* v. *Hayes*, *supra*, this Court rejected similar arguments advanced in support of creating a newsman's privilege. The reporters in that case had argued that their confidential sources would dry up if the sources believed that the reporter might be required to testify before a grand jury regarding the identity of the source or the information obtained from the source. The Court found the argument unpersuasive because the asserted result was highly speculative (408 U.S. at 693-694) and because, even if the ill-effect were assumed to occur in the future, it would not outweigh the present public interest in obtaining the information from the reporters (*id.* at 695). Cf. *Hawkins* v. *United States*, 358 U.S. 74, 81-82 (Stewart, J., concurring).

The cost of engaging in the financial deceit that the court below predicted would occur in the absence of a privilege is very high. If an accountant refuses to certify a public corporation's financial statements, the corporation may be excluded from the public capital markets and may be exposed to private causes of action. Respondent was, therefore, hardly at the mercy of its client in these circumstances. When confronted with an independent accountant's demand for additional information, the client has only three choices: (1) to provide the accountant the information requested; (2) to reconcile itself to receiving a qualified opinion, or (3) to discharge the accountant. See *In re John Doe Corp.*, 675 F.2d 482, 484-489 (2d Cir. 1982).

From the client's point of view, the latter two alternatives are highly undesirable. A qualified opinion would damage the client by revealing the nature, if not the facts, of the problem. Discharging the accountant would likewise harm the client because, under the securities regulations, a listed company must inform the Securities and Exchange Commission, as well as its shareholders, whenever its independent accountant resigns or is discharged (see 17 C.F.R. 249.308 and 240.14a-3(b)(4); 4 Fed. Sec. L. Rep. (CCH) ¶ 31,001, Form 8-K, Item 4, at 21,995 (May 4, 1983)); explain whether there had been any disagreements over an accounting treatment or principle in connection with the audits of the two most recent fiscal years; and request the former accountant to inform the Commission whether the accountant agrees with the company's response to Item 4. In addition, if a change of accountants has been reported in a Form 8-K during the 24 months immediately preceding the registration of new securities, the registrant must disclose the nature of the disagreement with the accountant and explain the effect on the financial statement of not having followed the former accountant's opinion (17 C.F.R. 229.304).

It is therefore the accountant's public duty to withhold certification of a false, incomplete or misleading state-

ment, and it is the sanctions of the securities laws—not the existence of any privilege—that provide the corporation with the necessary incentive to be candid with its independent auditor (see Pet. App. 37a-38a). The rationale for a communications privilege is accordingly inapplicable to this case.[25]

E. The court of appeals erred in assuming a conflict between the IRS summons authority and the securities regulation statutes

1. The court of appeals further erred in assuming a conflict between the federal statutes regulating securities and those enforcing revenue collection. Section 7602 of the 1954 Code unequivocally authorizes agents of the Internal Revenue Service to summon and inspect records that may be relevant to their investigation. On the other hand, the securities regulations relate to nothing more than the duty of listed corporations to file annual audited

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[25] *Upjohn Co.* v. *United States, supra*, upon which the court of appeals relied (Pet. App. 30a n.9), is not to the contrary. There, the Court held that the attorney-client privilege protected communications from a corporation's employees to its general counsel, who was conducting an investigation of questionable payments made by one of the corporation's foreign subsidiaries. In so holding, the Court rejected the government's argument that the privilege was inapplicable because the risk of civil or criminal liability would ensure that corporations would seek legal advice even in the absence of the privilege. The Court observed that absent the privilege, the depth and quality of any investigations to insure compliance would suffer. The Court added that the argument proved too much because even a corporation seeking to comply with the law has a strong incentive to disclose information to its lawyer (449 U.S. at 393 n.2).

But these considerations have no application here where the securities laws independently require certified financial statements made by accountants who have a separate and distinct obligation to the public. Hence, the law and not any privilege ensures candid communications between the public corporation and its outside auditor. In sharp contrast, consultation with an attorney is a voluntary act that the attorney-client privilege is designed to facilitate. See *United States* v. *El Paso Co., supra*, 682 F.2d at 544-545 n.16.

statements, and the duty of auditors to examine the statements under generally accepted principles of public accounting. The statutes and regulations do not even hint at any duty of accountants to keep their clients' communications confidential. It would be particularly incongruous to order accountants to do so when their basic function is to insure that the public is informed accurately.

As the Court made clear in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), a clear statement of congressional purpose is required to create a special rule preventing the disclosure of relevant information to a duly authorized government agency. In *St. Regis Paper Co.*, the Court construed Section 9(a) of the Census Act, 13 U.S.C. (1958 ed.) 9(a), which prohibits the Census Bureau from disclosing census information except in the form of statistical reports. St. Regis asserted that this prohibition was, in effect, a pledge of confidentiality and protected the company from having to disclose the same information to the Federal Trade Commission. This Court disagreed, holding that the statute merely forbade dissemination of the information by the Census Bureau; the statute did not curtail the normal investigatory powers of other government agencies: "Ours is the duty to avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result. * * * [W]hen Congress has intended like reports not to be subject to compulsory process it has said so. See 45 U.S.C. § 41, 49 U.S.C. § 320(f) (footnotes omitted)." 368 U.S. at 218. The present case follows a fortiori from *St. Regis Paper Co.*, since the securities laws and regulations do not contain any requirements of confidentiality for accountants.

2. Even if there were a potential conflict between the policies underlying the securities laws and the tax enforcement laws, the resolution of such a conflict of policy properly lies in Congress and not in the courts. The securities laws do not, on their face, create any exception to

the Internal Revenue Service's summons authority; a literal reading of the revenue provision plainly directs that relevant documents be produced. There is no justification for the assumption of the court below that the securities laws somehow limit or cut back on the scope of the Internal Revenue Service's summons authority. "One canon of construction is that repeals by implication are disfavored." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974). Since the IRS summons statutes and the securities laws are " 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Id.* at 133-134, quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). "With respect to enforcement of the tax laws, Congress itself has decided the policy issue, and it is not for the courts to challenge that determination." *United States* v. *Noall*, *supra*, 587 F.2d at 126. See also *FTC* v. *TRW, Inc.*, 628 F.2d 207, 210 (9th Cir. 1980). As the Fifth Circuit put it in *El Paso Co.* in reaching the opposite conclusion from that of the court below (682 F.2d at 545): "In the absence of a more profound clash between congressional policies, we cannot cut back on the summons power that Congress has given to the Service. We do not feel free to reweave the fabric of national legislation in accord with our notions of how various statutory schemes mesh. Such policy choices belong to the Congress."

CONCLUSION

The judgment of the court of appeals should be reversed, and the summons ordering production of the tax accrual workpapers should be enforced.

Respectfully submitted.

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